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In the Supreme Court of the United States

October Term, 1971
No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Appellants

vs.

PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees

On Appeal From the United States District Court for the Southern District of New York.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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INDEX

TABLE OF CITATIONS

CASES:

QUESTIONS PRESENTED

1. Whether New York Civil Service Law, §53, denies Appellees, lawfully admitted resident aliens, equal protection of the laws.

2. Whether New York Civil Service Law, §53, interferes with exclusive federal control over immigration and naturalization, in violation of the Supremacy Clause of the United States Constitution.

INTRODUCTION

Appellees (plaintiffs below) are seeking declaratory and injunctive relief from an allegedly unconstitutional state statute (New York Civil Service Law, §53 (McKinney 1959)), which, with certain exceptions, denies civil service employment to all New York residents who are not citizens of the United States. A three-judge panel found that the statute denies Appellees equal protection of the laws, in violation of the Fourteenth Amendment, and intrudes upon paramount federal control over immigration and naturalization, in violation of the Supremacy Clause. *Dougall v. Sugarman*, 339 F. Supp. 906, 907-08 and 910 (S.D. N.Y. 1971).

Pennsylvania has a statute similar to the one presently under attack: "Persons applying for positions or promotions in the classified service shall be citizens of the United States. . . ." Act of August 5, 1941, P. L. 752, Art. V, §501, as amended, 71 P.S. §741.501 (Supp. 1972-73). The Attorney General of Pennsylvania believes that such a provision is discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment, as well as the Supremacy Clause of the United States Constitution. Accordingly, by an informal opinion letter dated November 23, 1971, the Pennsylvania Civil Service Commission was advised and ordered "not to take any further actions to preclude candidacy of applicants for Civil Service positions on the ground of lack of citizenship."

The bases for the Attorney General's decision were more fully discussed in a subsequent formal opinion is-

sued to the State Board of Veterinary Medical Examiners, advising them that the statutory requirement of citizenship for licensing veterinarians is unconstitutional. *Official Opinion* No. 92, Op. Pa. Atty. Gen. 177 (1971) (Exhibit "A", attached hereto). Although this opinion was limited to veterinarians, its reasoning was followed in other formal opinions with respect to the licensing requirements for other professions. *Official Opinion No. 112,* Op. Pa. Atty. Gen. (March 15, 1972) (real estate brokers) (Exhibit "B", attached hereto); *Official Opinion No. 113,* Op. Pa. Atty. Gen. (March 23, 1972) (physicians) (Exhibit "C", attached hereto); *Official Opinion No. 114,* Op. Pa. Atty. Gen. (March 23, 1972) (pharmacists) (Exhibit "D", attached hereto); *Official Opinion No. 116,* Op. Pa. Atty. Gen. (April 4, 1972) (registered and practical nurses) (Exhibit "E", attached hereto).

The Commonwealth of Pennsylvania, with the consent of all counsel of record, has filed this brief in support of Appellees' position.

SUMMARY OF ARGUMENT

New York Civil Service Law, §53, bars aliens from securing employment in New York as career civil servants, thus drawing a classification which discriminates against Appellees solely because of their alienage. Appellees are denied the opportunity to work in New York on an equal basis with other residents of the State. The discrimination is "inherently suspect" because it interferes with a basic personal freedom, the right to work, *and* because it classifies on the basis of citizenship, a criterion which has been equated with wealth and race as generally irrelevant to any constitutionally acceptable purpose. The discrimination violates the Equal Protection Clause because it is not *necessary* to promote a *compelling* governmental interest.

New York argues that aliens are inherently disloyal and untrustworthy, so they should not be permitted to hold positions affecting matters of governmental policy. Section 53 is not *necessary* to promote this alleged governmental interest, since the statute bars aliens from the full range of civil service jobs, clerical as well as administrative positions. It is also illogical to conclude that the employment of aliens would subvert the governmental affairs of the State of New York, particularly inasmuch as aliens may be drafted into our armed forces and serve in other federal positions affecting our national security. The argument that employment of aliens as civil servants would disrupt New York's "continuity in the management of its affairs" is apparently grounded in the belief that aliens are more nomadic than citizens. No statistical

proof has been offered to support this assertion. It defies logic to claim that, *e.g.*, an alien who has lived in New York for ten years is more likely to leave the state than a citizen who has lived in ten *different* states in the past ten years. Length of residence might be relevant in hiring civil servants, but citizenship is not.

Section 53 also infringes upon the federal exercise of power over immigration and naturalization, in violation of the Supremacy Clause of Article VI of the United States Constitution. The New York statute interferes with comprehensive federal legislation governing admission of aliens and their rights and duties while in this country. Section 53 is not necessary to protect any "special public interest" of New York. Moreover, this exception to the Supremacy Clause is no longer applicable in *any* situation, since the bases for the exception have now been rejected by the United States Supreme Court.

ARGUMENT

I.

NEW YORK CIVIL SERVICE LAW, §53, DENIES APPELLEES, LAWFULLY ADMITTED RESIDENT ALIENS, EQUAL PROTECTION OF THE LAWS

A. New York Must Prove That Section 53 Is Necessary To Promote a Compelling Governmental Interest

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U. S. Const.*, Amend. XIV, §1. This constitutional guarantee is applicable to all persons lawfully abiding in the United States, including aliens. *Takahashi v. Fish and Game Comm'n.*, 334 U.S. 410, 420 (1947); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Under the "traditional" equal protection test, a state's classification is permissible unless it is "without any reasonable basis." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). The classification must bear some rational relationship to a legitimate state end. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Baxstrom v. Herold*, 383 U.S. 707 (1966). It must not be arbitrary or invidious. *Avery v. Midland County*, 390 U.S. 474 (1968). The instant case, however, requires application of much more stringent guidelines than the "traditional" test, under either of two lines of cases.

First, a classification which infringes upon free exercise of a basic personal freedom, "unless shown to be

necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel). Accord, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *NAACP v. Alabama*, 357 U.S. 449 (1958) (right of association); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (right to acquire, enjoy, own and dispose of property). The "compelling governmental interest" test is applicable to classifications which affect fundamental rights, irrespective of whether such rights are explicitly guaranteed under the Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969). An alien's fundamental right to work cannot be denied unless that denial is not *necessary* to secure a *compelling* governmental interest.

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citing cases.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

Section 53 of the New York Civil Service Law bars aliens from securing career employment as civil servants, one of the *most* common occupations in today's society. A person who has been deprived of the opportunity for employment has been "condemned to suffer grevious loss". *Joint Anti-Fascist Refugee Committee v. McGrath*, 340 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Because Section 53 deprives aliens of a fundamental constitutional right, New York must establish that it has a

compelling interest in barring aliens from civil service employment and that the classification as drawn is *necessary* to secure that interest.

The "compelling governmental interest" test is also applicable to this case because Section 53 draws a classification based on citizenship. Certain types of classifications, such as those based on citizenship, wealth or race, are inherently suspect and carry a burden of justification which is much heavier than the "traditional" test. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Goss v. Board of Education*, 373 U.S. 683 (1963). Because they are generally irrelevant to any constitutionally acceptable purpose, such classifications are subject to the *most* rigid judicial scrutiny and will be upheld only if *necessary* to secure a *compelling* state interest. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). This test is as applicable to classifications based on citizenship as to those based on wealth or race.

> "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis . . . *classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.* Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in Takahashi, 334 U.S., at 420, 68 S. Ct., at 1143, that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). (Emphasis added.)

In *Graham,* Pennsylvania's statutory denial of welfare benefits to resident aliens was overturned for lack of a *compelling* justification. 403 U.S. at 375. Because the New York statute also employs the inherently suspect criterion of alienage, *as well as* because the statute infringes upon a fundamental personal right, it must fall unless proven to be *necessary* to secure a *compelling* state interest.

B. The Justifications Offered To Support New York Civil Service Law, §53, Are Inadequate To Show a Compelling Governmental Interest

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New York has not only failed to prove that Section 53 is *necessary* to promote a *compelling* governmental interest, but careful examination of the reasons offered to justify Section 53 shows that the classification is also "without any reasonable basis". The denial of civil service employment to aliens cannot be upheld under the application of either the "traditional" equal protection test or the more stringent "compelling governmental interest" test which is applicable in this case.

Appellants first argue that aliens are properly denied employment because a civil servant "participates directly in the formulation and execution of government policy and thus must be free of obligations, including those to a foreign state, which might impair the exercise of his judgment or jeopardize public confidence in his objectivity." *Brief for Attorney General of the State of New York,* at p. 23 (hereinafter *"Brief for N.Y."*). However, Section 53 is *not* confined to civil servants who "participate directly in the formulation and execution of government

policy". In point of fact, although one of the named appellees was an administrative assistant, Sylvia Castro was employed as a *technician* and Esperanza Jorge and Teresa Vargas were *clerk-typists.* Assuming, *arguendo,* that aliens should be barred from policy-making positions because they cannot be trusted, this is no reason to bar aliens from *clerk-typist* positions, or from any other civil service jobs which do not call for the worker to make policy decisions. Without conceding that a more narrowly drawn statute would be permissible, it is not necessary to exclude aliens from *all* career civil service employment merely to prevent aliens from serving in the few genuinely sensitive positions.

Moreover, New York has offered no proof to support the anachronistic notion that aliens as a class are untrustworthy or incapable of exercising good judgment. A character and fitness inquiry might be appropriate under some circumstances, but the blanket banning of aliens cannot substitute for such a narrow inquiry. Congress has determined that permanent resident aliens, such as Appellees in the case at bar, are trustworthy enough to enlist in our armed forces and to rise as high in rank as their abilities and ambition dictate. 10 U.S.C.A. §§591 (b) (1), 3253(c) (1959), as amended (Supp. 1972). They are also fully subject to conscription under the Selective Service Act. 50 U.S.C. App. §§453, 454 (1968), as amended (Supp. 1972); 32 C.F.R. §§1611.1, 1611.2(b) (1972); *Astrup v. Immigration and Naturalization Service,* 402 U.S. 509 (1971). The exclusion of qualified applicants from career civil service positions, solely by reason of their alienage, bears no *rational relationship* to the goal of insuring that government workers are competent or free from conflicts of interests and it

clearly is not *necessary* to the promotion of that goal. See, *Raffaelli v. Committee of Bar Examiners*, 101 Cal. Rptr. 896, 496 P. 2d 1264, 1269-70 (1972).

New York further argues that aliens are necessarily disloyal and cannot honestly swear or affirm to "support the Constitution of the United States and the Constitution of the State of New York", as required by the New York Civil Service Law. *Brief for N.Y.*, at p. 24. There is, of course, no legal or practical reason why an alien cannot take such an oath. Aliens who enlist in the armed forces regularly take a much more explicit oath than required by New York. 10 U.S.C.A. §502 (Supp. 1972). The United States Congress is thus willing to place matters of national security in the hands of persons who are ineligible to work as clerk-typists for the City of New York. Aliens may serve with our armed forces, the Department of Defense, the Atomic Energy Commission, the Department of State and the United States Information Agency. It is no more rational to assume that non-citizens cannot be loyal to this country, or to the State of New York, than it is to assume that citizens cannot be *disloyal*. The mark of a person's integrity cannot be measured by his citizenship. New York's assertion to the contrary is without support in law, fact or reason.

New York also claims that the employment of aliens as career civil servants would hinder the State's "continuity in the management of its affairs" (*Brief for N. Y.*, at p. 26), because "the alien is subject to deportation and expulsion as well as conscription by the country of his nationality. . . ." *Id.* at p. 27. Aliens may, indeed, be deported or expelled for certain offenses, just as any alien *or* citizen may be arrested or imprisoned for the commission of a crime. New York's underlying argument ap-

pears to be that a non-citizen is more likely to be deported than a citizen is likely to be arrested. The implication that aliens necessarily are of low moral fiber cannot be given judicial sanction. New York's assertion that aliens are subject to conscription by their own country cannot justify Section 53, since the statute draws no distinction between aliens from those countries which do have conscription and those which do not. Further, all male citizens of this country are subject to conscription, yet *they* are not barred from civil service employment by New York. The fact that a person may be drafted cannot justify this discrimination against aliens. Lastly, New York has offered no proof that aliens are necessarily more nomadic than citizens and it defies logic to claim that, *e.g.*, a permanent resident alien who has lived in New York for ten years is more likely to move out-of-state than a citizen who has lived in ten *different* states in the past ten years. Without factual or logical support, this argument must fail.

The citizenship requirement discriminates unjustifiably and is inimical to the quintessential right of all persons to equality of opportunity under our laws. See Civil Rights Act of 1871, 42 U.S.C.A. §1981 (1970). It protects no valid interest of the State of New York. It does nothing to further the public welfare. It is not related to any valid employment criteria. It does not result in securing better civil service employees. As an attempt to prevent competition, it is clearly invalid. *Truax v. Raich*, 239 U.S. 33 (1915). As an attempt to protect the public, which is the only permissible justification, it is still invalid. The safeguards of educational standards and, where appropriate, a character and fitness investigation can adequately and directly serve this purpose. Citizen-

ship is irrelevant to any legitimate purpose of the New York Civil Service Law.

II.

NEW YORK CIVIL SERVICE LAW, §53, INTERFERES WITH EXCLUSIVE FEDERAL CONTROL OVER IMMIGRATION AND NATURALIZATION, IN VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

The Constitution and laws of the United States are the supreme law of the land, binding upon the individual states. *U. S. Const.*, Art. VI, §2. The states may not pass legislation with respect to aliens, since this is "an area constitutionally entrusted to the Federal Government." *Graham v. Richardson*, 403 U.S. 365, 378 (1971). Accord, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. Fong Yue Ting v. United States, 149 U.S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer their hospitality." *Truax v. Raich*, 239 U.S. 33, 42 (1915).

Congress has fully preempted the field of aliens and immigration with the comprehensive Immigration and

Nationality Act, 8 U.S.C.A. §§1101-1503 (1970). The Act contains thorough and specific guidelines governing the admission of aliens, as well as their rights and duties while in this country. Section 53 of the New York Civil Service Law infringes upon this pervasive legislation and, therefore, is an unconstitutional violation of the Supremacy Clause of the United States Constitution.

State discrimination against aliens has been allowed only where the legislation was necessary to protect a "special public interest". *Truax v. Raich,* 239 U.S. 33, 42-43 (1915). This exception was explained in *Takahashi v. Fish and Game Comm'n.,* 334 U.S. 410, 416-17 (1948), where the Court found no "special public interest" to justify California's discrimination against alien fishermen. As indicated by the discussion in the immediately preceding Section of this brief, New York does not have a "special public interest" in denying civil service employment to aliens. Moreover, irrespective of the facts in this case, the "special public interest" doctrine is no longer a viable basis for carving out exceptions to the Supremacy Clause.

The doctrine has been used to justify approval of discriminatory state legislation to (1) confine the enjoyment of a state's natural resources to citizens and (2) bar aliens from owning real estate. *Graham v. Richardson,* 403 U.S. 365, 373 nn. 7-9 (1971); *Truax v. Raich,* 239 U.S. 33, 39-40 (1915). However, the cases cited in *Graham* and *Truax* must be firmly limited to their facts, in view of the more humane attitude expressed in subsequent cases. *E.g., Graham v. Richardson,* 403 U.S. 365, 376 (1971) (public revenue); *Shapiro v. Thompson,* 394 U.S. 618, 632-33 (1968) (state services); *Takahashi v. Fish and Game Comm'n.,* 334 U.S. 410, 420-21 (1948)

(natural resources); *Oyama v. California*, 332 U.S. 633, 647-74 (1948) (plurality of concurring opinions) (real estate). See *Shelley v. Kraemer*, 334 U.S. 1 (1948). Since the precedent upon which it was based has been effectively excised, the doctrine itself should no longer be applied.

As discussed in *Graham v. Richardson*, 403 U.S. 365, 373-74 (1971), the theory which supported the "special public interest" doctrine was that governmental benefits are "a privilege, rather than a right, [which] may be made dependent upon citizenship." *People v. Crane*, 214 N.Y. 154, 161, 108 N.E. 427, 430 (1915), aff'd, 239 U.S. 195 (1915). "But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. at 374. Both the cases and the theory which formerly supported the doctrine have been rejected, so the doubt which was cast upon its validity by *Takahashi* has been cleared and the doctrine itself is no longer valid. The Supremacy Clause must be applied without exception, thereby barring New York's attempt to legislate where Congress has already acted.

CONCLUSION

For the reasons set forth above, the judgment of the United States District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

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EXHIBIT "A"

OFFICIAL OPINION NO. 92

Veterinarians—State Board of Veterinary Medical Examiners—Licensing of noncitizens.

1. Citizenship requirement in Section 3(c) of the Veterinary Law, 63 P.S. §506-3(c) is unconstitutional and the State Board of Veterinary Medical Examiners is instructed to issue a license to practice veterinary medicine to applicants who meet all other requirements except citizenship.

2. Basis of this decision is the 14th Amendment to the United States Constitution which applies not only to citizens of the United States but to aliens as well.

3. A state may classify on the basis of citizenship, but each classification must be reasonable and are inherently suspect and subject to close scrutiny.

4. If a state may not withhold from aliens its tax revenues for welfare; public works, and civil service expenditures, nor its resources from lawful exploitations, and it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise well qualified.

5. The citizenship requirement is an unjustifiable discrimination, for it protects no valid interest of the Commonwealth.

Harrisburg, Pa.
December 17, 1971

Charles J. Hollister, D.V.M.
Secretary
State Board of Veterinary Medical Examiners
279 Boas Street
Harrisburg, Pennsylvania

Dear Dr. Hollister:

You have requested our advice as to whether your Board may license to practice veterinary medicine an applicant who meets all the requirements of The Veterinary Law of April 27, 1945, P. L. 321, 63 P.S. §506, except for the citizenship requirement in Section 3 of the Law, 63 P.S. §506-3(c), which requires that a licensee be "a citizen of the United States." Your Board has advised my Deputy that it knows of no reason inherent in the practice of Veterinary Medicine in this Commonwealth why a practitioner should need to be a citizen of the United States, and that the particular applicant meets all the other requirements of licensure.

It is our opinion and you are so advised that the citizenship requirement in Section 3(c) of the Law is unconstitutional and you are therefore instructed to issue a license to practice veterinary medicine to the particular applicant and to any other non-citizen applicants who meet all other requirements.

In view of the significance of this decision not only to The Veterinary Law, but to other statutes of the Commonwealth requiring citizenship, we are setting forth at some length the basis of our decision. At this time, we are ruling only on the citizenship requirement in The Veterinary Law and are doing so expeditiously so that the

license may be issued forthwith. We expect to deal with other similar restrictions in subsequent opinions as the issues are brought to our attention.

In brief, the basis for our decision is the Fourteenth Amendment to the United States Constitution which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (Emphasis added.)

It has long been held that the above-quoted Equal Protection Clause applies not only to citizens of the United States, but to aliens as well. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). This does not mean that a state may not classify on the basis of citizenship, but that such classifications must be reasonable and when based on alienage, they "are inherently suspect and subject to close scrutiny." *Graham v. Richardson,* 403 U.S. 365, 372 (1970).

Thus, in *Truax v. Raich,* 239 U.S. 33 (1915), the Supreme Court held unconstitutional an Arizona law which required employers of more than five workers to employ at least eighty per-cent qualified electors or native born citizens on the ground that it violated the rights of aliens to equal protection. The Court stated that the broad range of legislative discretionary power to classify "does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." 239 U.S. at 41. The Court continued that the right to work in the common occupations "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." *Id.* The fact that the law allowed a twenty percent quota of aliens did not

save it because the State had no right at all to enact any restraint in the area.

The next landmark case on the subject is *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). That case involved a California law which restricted commercial fishing licenses to persons who were citizens or eligible for citizenship. This meant that Japanese citizens, who were not eligible for United States citizenship, were prohibited from obtaining such licenses. California justified the law on the ground that fish were a natural resource of the state which it had the right to protect and that it had made a reasonable classification in denying the privilege of fishing to aliens. The Court struck down the law as unconstitutional holding (334 U.S. at 420):

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

In *Purdy & Fitzpatrick v. State,* 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), the Supreme Court of California struck down a law prohibiting the employment of aliens on public works as arbitrarily discriminatory under the Fourteenth Amendment. It specifically rejected an argument that the state has the right to protect its own citizens from competition from aliens, even where the disbursement of public funds is involved. The objective of favoring citizens of the United States is not a valid compelling state interest which permits such discrimination.

The most recent Supreme Court decision on the subject is *Graham v. Richardson,* 403 U.S. 365 (1970) which

struck down statutes (including the Pennsylvania statute) denying welfare benefits to aliens. The Court construed *Takahashi* as casting doubt on the continuing validity of the special state interest doctrine in all contexts. It held that the justification of limiting costs to the state invalid and unreasonable. As to the issue of whether welfare is a privilege rather than a right, and thus not subject to the same protection, it dismissed the issue reaffirming earlier holdings that constitutional determinations no longer turn on this distinction. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963).

Finally, we note the very recent case of *Dougall v. Sugarman,* 330 F. Supp. 265 (S.D. N.Y. 1971) holding invalid a New York law prohibiting aliens from civil service positions. The justifications raised to support constitutionality—loyalty and efficiency—were rejected. The Court also rejected the argument that citizens were more likely to remain in the civil service as career employes, thus saving the cost of retraining, and held that even if this were so, it could not justify the discrimination in face of the Fourteenth Amendment.

Despite these cases, there still remain many statutes in all states imposing restrictions upon aliens. These have been justified by the proprietary interest and police power of the state, but they are clearly based on a prejudicial mistrust of aliens and a desire to protect citizens from competition. This can be seen from a review of one decision which did strike down such a restriction. In *State v. Ellis,* 184 P. 2d 860 (Ore. 1947), the Court held that a citizenship requirement to be a barber was unconstitutional, following an earlier Michigan case which had ruled similarly. *Templar v. State Board of Examiners,* 131

Mich. 254, 90 N.W. 1058 (1902). The significance of *Ellis,* however, is not so much what it did (in view of the *Takahashi* decision), but the distinction it attempted to make from older decisions holding citizenship requirements to be constitutional. It distinguished cases preventing aliens from engaging in occupations subject to possible abuses or attended by harmful tendencies, such as pool rooms or peddlers, *Ohio ex rel. Clarke v. Deckebach,* 274 U.S. 392 (1927); *Comm. v. Hana,* 81 N.E. 149 (Mass. 1907); or involving public safety, such as pharmacists or lightning rod salesmen, *Sashihara v. State Board of Pharmacy,* 46 P. 2d 804 (Cal. 1935); *State v. Stevens,* 99 Atl. 723 (N.H. 1916). Rather than noting the rejection of the rationales in those cases, the Court in *Ellis* continued to reflect a prejudice to aliens which is inimical to the Fourteenth Amendment by attempting to distinguish those cases.

The validity of any of the justifications and of the cited cases was, however, cast into doubt even before the Court's statement in *Graham v. Richardson,* 403 U.S. at 374-376, in an excellent Note, "Constitutionality of Restriction on Aliens' Right to Work," 57 Colum. L. Rev. 1012 (1957). The authors of the Note observed that exclusions from the professions continue even though some changes have been brought about in other areas such as barbers. They conclude that no justification in the professional area exists:

> "The connection between citizenship and medical competency, for example, is not at all clear. Although the rationalization of such statutes is the inferiority of foreign education or the inability to accurately check an alien's qualifications, there has

been no convincing show of reasonableness in such legislation since standards adequate to protect the public could be set up for the admission of foreign physicians." *Id.* at 1026.

We note, parenthetically, that not even that justification exists in the current case where the applicant has been trained at the only, and, perforce, the best school of veterinary medicine in the Commonwealth of Pennsylvania, has passed the examination, and complied with the other prerequisites for licensure.

Under the recent cases, the citizenship requirement in The Veterinary Law cannot stand. Though none of the cases deal with this specific question, in our opinion they mandate this decision *a fortiori.* If a state may not withhold from aliens its tax revenues for welfare (*Graham v. Richardson*), public works (*Purdy & Fitzpatrick*), and civil services expenditures (*Dougall v. Sugarman*), nor its resources from lawful exploitation (*Takahashi*), then it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise qualified.

The citizenship requirements discriminates unjustifiably. It protects no valid interest of this Commonwealth. It does nothing to further the public welfare. It is not related to any valid licensing requirement. It does not result in bettter veterinary standards. As an attempt to prevent competition it is clearly invalid. As an attempt to protect the public, which is the only real justification, it is still invalid. The safeguards of education and examination are sufficient to cover this valid policy. Citizenship adds nothing. The mere fact that the state may legitimately regulate licensure does not mean that it may do so on the basis of improper classification.

It should also be pointed out that lack of citizenship is no bar to service in the Armed Forces of the United States Government. The Selective Service Law provides that male aliens entering the United States must register for the draft (32 CFR §1611 et seq.) and it is common for alien doctors to be drafted for medical service with the Armed Forces. Under such circumstances, it would be anomalous, to say the least, to require that doctors who treat horses must be citizens, but doctors who treat men need not.

Although the above is sufficient to lay the basis of our decision, we note that the cases have also relied on the supremacy of federal action involving aliens. In other words, Congress under the authority of the U. S. Constitution (Article I, Section 8), has relegated to itself the regulation of aliens through the enactment of comprehensive immigration laws. 8 U.S.C. §1101 et seq. Federal law, therefore, determines who will be allowed a visa to work in this country. Indeed, preference is given to "qualified immigrants who are members of the professions." 8 U.S.C. §1153(a)(3). In addition, federal law determines employment desiderata. 8 U.S.C. §1184. In light of the federal occupation of the area of the law, state restrictions on ability to obtain certain types of employment and welfare have been stricken down on the additional ground that such restrictions improperly interfere with the federal power. "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1947). See also *Graham v. Richardson*, 403 U.S. 365, 377-379 (1971);

***Truax v. Raich*, 239 U.S. 33 (1915); *Purdy & Fitzpatrick v. State*, 456 P. 2d 645, 649-653 (1969); 42 U.S.C. §§1981-1983.**

Sincerely yours,
J. Shane Creamer,
Attorney General.

EXHIBIT "B"

OPINIONS OF THE ATTORNEY GENERAL

OFFICIAL OPINION NO. 112

Real Estate Brokers—Salesman—Citizenship

1. Sections 6(b) and 7(c) of the Real Estate Brokers License Act, 63 P.S. §§436(b), 437(c) are unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

Harrisburg, Pa. 17120
March 15, 1972

Mr. Samuel B. Saxton, Chairman
State Real Estate Commission
Room 300, 279 Boas Street
Harrisburg, Pennsylvania

Dear Mr. Saxton:

You have requested our opinion as to whether an individual who otherwise meets the requirements of Section 7(c) of the Real Estate Brokers License Act, 63 P.S. §437(c), may be refused the right to take the Real Estate Salesman's Examination merely because he is not a citizen of the United States. That Section specifically states:

"No person may be licensed by the department as a real estate salesman, unless such person is a citizen of the United States."

Additionally, Section 6(b) of the Act, 63 P.S. §436 (b) states that no person may be licensed as a real estate broker unless such person ". . . (2) is a citizen of the United States. . . ."

It is our opinion, and you are so advised, that both of the above Sections are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received.

Accordingly, with respect to the specific applicant and all future applicants, citizenship, which plays no part in the ability of a person to serve properly as a licensee, may no longer be a requirement.

Sincerely,
Gerald Gornish
Gerald Gornish
Deputy Attorney General

(s) JSC
J. Shane Creamer
Attorney General

EXHIBIT "C"

OFFICE OF THE ATTORNEY GENERAL

OPINION NO. 113

Physicians—Medical Practice Act—Citizenship

1. Section 5 of the Medical Practice Act, 63 P.S. §405 is unconstitutional insofar as it imposes a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the equal protection clause in the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

Harrisburg, Pa. 17120
March 23, 1972

Honorable Vincent J. Fumo
Acting-Commissioner
Bureau of Professional & Occupational Affairs
279 Boas Street
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether an individual who otherwise meets the requirements of the Medical Practice Act of June 3, 1911, P. L. 639, as amend-

ed, 63 P.S. §401 et seq., for licensure, may be denied such licensure merely because he is not a citizen of the United States.

Section 5 of the Act, 63 P.S. §405, provides in pertinent part:

> "Each applicant for licensure under the provisions of this act shall furnish, prior to any examination by the said Board, satisfactory proof that he is a citizen of the United States or has declared his intention of becoming a citizen. . .
>
> * * * * * * * *
>
> "Applicants from countries foreign to the territory of the United States, who desire to be licensed by said Board, . . . shall present a certificate of United States citizenship or a declaration of intention. . . . The license of any licensee who fulfils the requirements of this act relating to citizenship by presenting a declaration of intention of becoming a citizen, shall be automatically revoked by the Board if such licensee does not present a certificate of United States citizenship to the Board within seven years after original licensure."

It is our opinion, and you are so advised, that the above requirements are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners, of December 17, 1971, a copy of which you have received. The above-quoted provision, by denying licensure to an individual who does not take steps to become a citizen, or who cannot qualify to become a citizen, denies that individual equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution.

The conclusion we have reached, it may be observed, is even more compelling in this instance than it was in our opinion of December 17, 1971. The Medical Practice Act does not even pretend that there is a compelling state interest in requiring citizenship as a prerequisite for licensure to practice medicine and surgery, since it allows non-citizens to practice up to seven years in this status. It is, therefore, clear beyond doubt that the citizenship requirement is not a necessary or proper qualification prerequisite for licensure, but that it deprives non-citizens of equal protection for no reason. Accordingly, it is unconstitutional and unenforceable.

Finally, we note that this restriction has not served the public interest. As you have stated, and as we have learned from the recent reports by the State Department of Health and the Pennsylvania Medical Society, there is a serious dearth of licensed physicians in Pennsylvania. The removal of this unconstitutional citizenship restriction may, thus, it is hoped, help alleviate this situation and lead to improved health care for the citizens of this Commonwealth.

Sincerely yours,
Gerald Gornish
Gerald Gornish
Deputy Attorney General

(s) JSC
J. Shane Creamer
Attorney General

EXHIBIT "D"

OFFICE OF THE ATTORNEY GENERAL

OFFICIAL OPINION NO. 114

Pharmacy Board—Citizenship—Licensure—Age Requirement

1. Section 3(a)(1) of the Pharmacy Act, 63 P.S. §390-3(a)(1) is unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

3. Requirement in Section 3(a)(1) of the Pharmacy Act, 63 P.S. §390-3(a)(1), that a pharmacist be not less than twenty-one (21) years old is effective and binding.

4. Where the American Council of Pharmaceutical Education or its successor has failed to accredit a foreign school or college of pharmacy, under Section 3(a)(3) of the Pharmacy Act, 63 P.S. §390-3(a)(3), the State Board of Pharmacy is authorized to make its own independent determination as to whether the school or college meets the standards generally required of accredited schools.

Harrisburg, Pa. 17120
March 23, 1972

Mr. Sol. S. Turnoff, Chairman
State Board of Pharmacy
279 Boas Street
Harrisburg, Pennsylvania

Dear Mr. Turnoff:

You have requested our opinion on whether the twenty-one (21) year age and United States citizenship requirements of Section 3(a)(1) of the Pharmacy Act, 63 P.S. §390-3(a)(1) remain in effect and must be adhered to in carrying out its licensing function.

The statutory requirement that a pharmacist be not less than twenty-one years old is effective and binding. You have called to our attention, the fact that there has been an amendment to Section 701 of the Pennsylvania Election Code, 25 P.S. §2811, allowing eighteen (18) year olds to vote (Act No. 29 of 1971). We may also note Amendment XXVI to the Constitution of the United States, which similarly lowers the voting age to eighteen (18) years of age or older. These amendments, however, are limited to and do not extend beyond the right to vote. There have been several other bills recently introduced in the Legislature reducing age requirements, all of which are similarly limited to certain areas. Two of these bills would lower the age of pharmacists (Senate Bill No. 62 of 1971; House Bill No. 1674 of 1971), but neither has passed even one house of the Legislature. In our opinion, the legislative restriction of licensure to twenty-one (21) years of age and over is a reasonable determination by the Legislature regarding practice of pharmacy, which is a profession requiring maturity and care. The require-

ment is thus constitutional and enforceable. See *George v. United States,* 196 F. 2d 445 (9th Cir. 1952), *cert. denied,* 344 U.S. 843 (1952).

With respect to your question regarding citizenship, it is our opinion and you are so advised, that this requirement is unconstitutional and unenforceable based on our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received, for the reason that it deprives non-citizens of equal protection of laws within the meaning of the Fourteenth Amendment of the Constitution of the United States. Citizenship is not a valid criterion in determining whether an individual is qualified to receive a pharmacist's license.

We note finally, that Section 3(a)(3) of the Pharmacy Act, 63 P.S. §390-3(a)(3), requires every pharmacist to hold a "degree in pharmacy granted by a school or college of pharmacy which is accredited by the American Council of Pharmaceutical Education, or its successor." It is our understanding that the Council does not accredit foreign pharmacy schools. Therefore, in some of the applications before your Board, the applicants may not hold a degree in pharmacy from such an accredited school or college of pharmacy. We hold some doubts regarding the propriety of the method of accreditation, since it may be an improper delegation of legislative authority. However, in keeping with the rules of statutory construction, we need not decide the issue, so long as you may exercise your duties properly in any event. Section 52(3) of the Statutory Construction Act of May 28, 1937, 46 P.S. §552(3); *Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549, 575-585 (1947); *Robinson Township School*

District v. Houghton, 387 Pa. 236 (1956). Accordingly, should this requirement present a problem in any case, we suggest that you request the Council's advice regarding accreditation, and if none exists because the Council has not investigated the institution, it is our opinion, and you are so advised, that you may make your own independent determination as to whether the school or college meets the standards generally required of the accredited schools which you do recognize.

Sincerely yours,
Gerald Gornish
Gerald Gornish
Deputy Attorney General

(s) JSC
J. Shane Creamer
Attorney General

EXHIBIT "E"

OFFICE OF THE ATTORNEY GENERAL

OFFICIAL OPINION NO. 116

Registered Nurses — Practical Nurses — Citizenship Requirement—Licensure

1. Sections 6 and 14(9) of the Professional Nursing Law of May 22, 1951, 63 P.S. §211 et seq., are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the protection clause in the United States Constitution.

2. Sections 5 and 16(9) of the Practical Nurse Law of March 2, 1956, 63 P.S. §651 et seq., are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the protection clause in the United States Constitution.

3. Opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, & Opinion No. 113 followed.

Harrisburg, Pa. 17120
April 4, 1972

Honorable Vincent J. Fumo
Acting Commissioner
Professional & Occupational Affairs
279 Boas Street
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether individuals who otherwise meet the requirements of licensure under The Professional Nursing Law of May 22, 1951, 63 P.S. §211 et seq., and the Practical Nurse Law of March 2, 1956, 63 P.S. §651 et seq., may be denied such licensure for the sole reason that they are not citizens of the United States.

Both of these laws require citizenship. Section 6 of The Professional Nursing Law, as amended, 63 P.S. §216, provides that:

> "Every applicant, to be eligible for examination for licensure as a registered nurse, shall furnish evidence satisfactory to the Board that he or she is a citizen of the United States or has legally declared an intention to become such. . . ."

Section 14(9) of the Law, 63 P.S. §224(9) further provides:

> "The Board may suspend or revoke any license in any case where the Board shall find that—
>
> * * * * * * * *
>
> (9) The licensee having obtained a license upon declaration of intention to become a citizen of the United States, has not become a citizen of the United

States within seven (7) years after the date of such declaration of intention."

The Practical Nurse Law contains similar requirements. Section 5 of the Law, as amended, 63 P.S. §655 provides:

> "Every applicant for examination as a licensed practical nurse shall furnish evidence satisfactory to the board that he or she . . . is a citizen of the United States or has legally declared intention to become such. . . ."

Section 16(9) of the Law, 63 P.S. §666(9) further provides:

> "The Board may suspend or revoke any license in any case where the Board shall find . . .
>
> * * * * * * * *
>
> (9) That said licensee having obtained a license or certificate of record upon declaration of intention to become a citizen of the United States has not become a citizen of the United States within seven (7) years from the date of such declaration of intention."

For the reasons set forth in our opinion to the State Board of Veterinary Medical Examiners, dated December 17, 1971, a copy of which you have received, as further amplified in our Opinion No. 113 regarding the Medical Practice Act, the above requirements are unconstitutional and unenforceable. The requirements in both of the laws here in question are similar to those we declared invalid in Section 5 of the Medical Practice Act, 63 P.S. §405; the reasons for finding these requirements unenforceable are similarly compelling in this case. Accordingly, you

should advise and offer licensure to any non-citizen who is within or beyond the seven (7) year period.

We make two further observations. First, having been advised that there is a great shortage of qualified licensed nurses in the Commonwealth of Pennsylvania, we are gratified to know that the removal of this unconstitutional requirement will result in a direct and immediate benefit to the public. Second, we note that since our comprehensive opinion of December 17, 1971, the United States Court of Appeals for the Third Circuit (which includes Pennsylvania) has ruled, in a similar context, that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the Virgin Islands from requiring citizenship as a prerequisite to participation in a territorial scholarship fund. *Chapman v. Gerard*, 40 U.S. Law Week, 2565 (1972). Our analysis in this and other recent opinions on the same subject is thus confirmed by the highest federal court having immediate jurisdiction over Pennsylvania.

Sincerely yours,
Gerald Gornish
Gerald Gornish
Deputy Attorney General

(s) JSC
J. Shane Creamer
Attorney General